

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## INTERIM ORDER MO-3257-I

Appeal MA14-565

Town of Niagara-on-the-Lake

October 29, 2015

**Summary:** The appellant sought access to the identifying information of a by-law complainant which was withheld by the town. In Interim Order MO-3214-I, I determined that this information was subject to exemption under section 38(a), in conjunction with section 8(1)(d) (confidential source of information) and ordered the town to exercise its discretion. In Interim Order MO-3231-I, I did not uphold the town's exercise of discretion and ordered it to re-exercise its discretion. In this Interim Order, I again do not uphold the town's exercise of discretion and order it once again to re-exercise its discretion.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 38(a).

**Orders Considered:** Orders MO-1287-I, MO-3214-I, MO-3231-I and P-58.

### OVERVIEW:

[1] The Town of Niagara-on-the-Lake (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for all records related to a "letter of notice" from a named by-law enforcement officer and addressed to the requester. The letter of notice related to a "licensed villa" at a specified location.

[2] Citing section 8(1)(c) of the *Act* (reveal law enforcement investigative techniques) in its decision letter, but reproducing the language of the section 8(1)(d)

exemption (refusal to disclose identity of a confidential source of information) the town denied access to a complaint which it had identified as being responsive to the request.

[3] The requester (now the appellant) appealed the town's denial of access.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending the town and the affected party a Notice of Inquiry setting out the facts and issues in the appeal.

[5] The town responded in a letter advising that:

The [town] does not believe that there are additional factors, which are relevant to the appeal, in addition to the information previously submitted to the IPC.

[6] The town also writes that at mediation the record at issue was disclosed to the appellant, "with personal information severed, subject to *MFIPPA* section 8(1)(d)".

[7] The affected party did not provide responding representations.

[8] I then sent the appellant a Notice of Inquiry. The appellant provided responding representations.

[9] After conducting my inquiry under the *Act*, I issued Interim Order MO-3214-I.

[10] I upheld the town's application of the exemption at section 38(a), in conjunction with section 8(1)(d), but determined that the town had to exercise its discretion under section 38(a) with respect to the withheld information. At paragraph 43 of the interim order, I required the town to take into account the appellant's submissions and the relevant considerations that I set out in detail in Interim Order MO-3214-I when exercising its discretion.

[11] In addition, Order Provision 1 of Interim Order MO-3214-I required the town to provide both the appellant and me with an outline of the factors it considered in exercising its discretion.

[12] In response to Interim Order MO-3214-I, the town provided me with a letter simply stating:

Further to the Interim Order MO-3214-I referenced above, please be advised under *MFIPPA* section 38(a) the Corporation of the Town of Niagara-on-the-Lake, in exercising its discretion not to disclose personal information, considered section 8(1) of the *Act* as follows:

8(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[13] I then issued Interim Order MO-3231-I. Again, I did not uphold the town's exercise of discretion and ordered it to re-exercise its discretion. My determinations are set out at paragraphs 17 and 18 of that decision, where I wrote:

Based on the town's letter, I find that it has not properly exercised its discretion. Instead, the town simply sets out the section of the *Act* it applied in denying access to the information sought. This is not sufficient and does not address the direction I gave the town that in exercising its discretion it was to take into account the appellant's submissions and the relevant considerations that I set out in detail at paragraphs 38 to 42 of Interim Order MO-3214-I.

Accordingly, I have decided to again return this appeal to the town for the purpose of properly exercising its discretion in making a decision whether or not to withhold the undisclosed personal information pursuant to section 38(a) of the *Act*. I encourage the town to review paragraphs 38 to 42 of Interim Order MO-3214-I before it provides me with further representations on the exercise of its discretion.

[14] In response to Interim Order MO-3231-I, the town provided me with a further letter, which states:

Further to your letter dated August 18, 2015 and Interim Order MO-3231-I referenced above, please be advised under the *Municipal Freedom of Information and Protection of Privacy Act (Act)* section 38(a) the Corporation of the Town of Niagara-on-the-Lake considered the following in exercising its discretion not to disclose personal information:

- The privacy of individuals should be protected. The town has provided all information except the personal information of the confidential source being name, email address, property address and telephone number.
- The historic practice of the Town with respect to similar information. The Town does not disclose personal information provided by a confidential source.
- Disclosure would identify a confidential source of information in respect of a law enforcement matter. Section 8(1) states: A head

may refuse to disclose a record if the disclosure could reasonably be expected to, (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[15] The appellant was provided an opportunity to comment on the town's letter and provided extensive responding submissions.

[16] The appellant takes the position that the town has, once again, failed to comply with the direction given in both previous interim orders. Namely, that in exercising its discretion, the town was to take into account the appellant's submissions and the relevant considerations that I set out in detail at paragraphs 38 to 42 of Interim Order MO-3214-I.

[17] The appellant submits that the most recent letter provided by the town:

... makes no mention, does not address, completely ignores and does not take into any consideration in the exercise of its discretion [the appellant's] submissions and the relevant considerations set out in detail in paragraphs 39 to 42 of Interim Order MO-3214-I, as directed therein and re-ordered with MO-3231-I.

...

In doing so the town does not comply with the mandate and, indeed, spirit of the *Act* which is the balance of privacy protection with the public's right to know by scrupulously weighing these factors in this case.

[18] The appellant submits that, in particular, the town does not consider that the personal information the appellant seeks is "necessary to [the appellant] for the protection of [her] fundamental and legal rights".

[19] The appellant further submits that:

[The appellant has] in detail explained in [her] representations submitted during this inquiry ... that the person regarded by the town as the confidential source provided the town with false and defamatory information ... , a fact confirmed by the town's investigation pursuant to the complaint that could lead to criminal charges and the deprivation of our business licence. [The appellant] further alleged as set out in paragraph 24 of Interim Order MO-3214-I that this person may be engaging in serial illegal activities including stalking [and] harassment, and it is impossible for [the appellant] to exercise [her] fundamental and legal rights unless the identity of the person is disclosed.

[20] With respect to the town's historic practice, the appellant submits that the town's

website setting out the process for submitting by-law complaints “implies a ‘blanket non-disclosure’” over the information of a complainant and thereby disregards the mandate of the *Act* to balance access and privacy rights under section 38(b).<sup>1</sup>

[21] Finally she submits that the alleged confidential source, “may be continuing its illegal agenda and defamation” based on a recent notification by the town of another complaint.

[22] The town was invited to comment on the appellant’s submissions. It advised that it had nothing to add.

## **DISCUSSION**

[23] An institution’s exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.<sup>2</sup> It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.<sup>3</sup>

[24] At paragraphs 38 to 42 of Order MO-3214-I, which contains my discussion of the relevant considerations in the exercise of discretion and my analysis of how the town had failed to properly exercise its discretion, I wrote the following:

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected

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<sup>1</sup> The appellant refers to Order MO-1287-I in support of this submission. The appellant also compares the town’s website to an excerpt from the by-law enforcement website of the City of Hamilton to support her position that the wording of the town’s website does not suggest an exercise of discretion.

<sup>2</sup> Order MO-1287-I.

<sup>3</sup> Order P-58.

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[39] Citing the purpose of the *Act* set out in section 1 of the statute, the appellant submits that:

It is not the purpose of the *Act* to shield an individual's engagement in fraudulent complaints and illegal activity such as defamation or harassment, nor is the purpose of the *Act* to deprive the individual victim of this activity from its fundamental right to resort to justice, and from pursuing its lawful rights.

[40] The appellant alleges that it is in the public interest that the identity of the complainant be disclosed. The appellant submits that the non-disclosure of the withheld information "deprives us of the means to establish if there is a relation or complete identification with the harassing individual engaging in a serial manner in unlawful, fraudulent and defamatory conduct and to seek legal remedies".

[41] The appellant asserts that the town should have exercised its discretion in favour of disclosing the withheld information. The appellant submits that it should have taken into account the following two considerations in the exercise of its discretion:

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester and the affected party
- The requester has a sympathetic or compelling need to receive the information

[42] The appellant submits that without the disclosure “we are deprived of our fundamental right to resort to justice, of equality of legal weapons, and from the pursuing of our lawful rights.”

[25] In Interim Order MO-3231-I, as set out above, I wrote:

Based on the town’s letter, I find that it has not properly exercised its discretion. Instead, the town simply sets out the section of the *Act* it applied in denying access to the information sought. This is not sufficient and does not address the direction I gave the town that in exercising its discretion it was to take into account the appellant’s submissions and the relevant considerations that I set out in detail at paragraphs 38 to 42 of Interim Order MO-3214-I.

[26] While the town’s most recent letter provided in response to my Interim Order MO-3231-I did provide some information pertaining to its exercise of discretion, it did not fully address all the considerations in paragraphs 38 to 42 of Interim Order MO-3214-I that I had encouraged the town to review. I find that again, based on the town’s most recent letter provided in response to my Interim Order MO-3231-I, the town has not properly exercised its discretion.

[27] Accordingly, I have decided to yet again return this appeal to the town for the purpose of properly exercising its discretion in making a decision whether or not to withhold the undisclosed personal information pursuant to section 38(a) of the *Act*. I have set out herein paragraphs 38 to 42 of Interim Order MO-3214-I, so the town is made aware of what it should address before it provides me with further representations on the exercise of its discretion.

## **ORDER:**

1. I order the town to exercise its discretion under section 38(a) of the *Act* with respect to the information I have found exempt under section 38(a) in Interim Order MO-3214-I.
2. I order the town to provide me with representations on its exercise of discretion by **November 20, 2015**.

3. I may share the town's representations with the other parties to this appeal unless they meet the confidentiality criteria identified in Practice Direction 7. If the town believes that portions of its representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions it seeks to withhold.
4. I remain seized of this appeal to deal with the town's exercise of discretion.

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ October 29, 2015